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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. [redacted] 9

ATLANTA, BIRMINGHAM & COAST RAILROAD COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

STATEMENT BY APPELLANT OF THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

CARL H. DAVIS,
JOHN A. HYNDS,
ROBERT C. ALSTON,
WILLIAM HART SIBLEY,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 797

ATLANTA, BIRMINGHAM & COAST RAILROAD COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

STATEMENT BY APPELLANT OF THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES TO REVIEW UPON APPEAL THE ABOVE ENTITLED CAUSE.

(a) The Statutory Provisions Sustaining the Jurisdiction.

Appellant relies upon Section 238 of the Judicial Code as amended by the Act of Congress of February 13, 1925, (Chapter 229, 43 Stat. 938, 28 U. S. C. A. 345), and also

upon the Urgent Deficiencies Act of October 22, 1913, (Chapter 32, 38 Stat. 219, 220, 28 U. S. C. A. 47a) as sustaining the jurisdiction of the Supreme Court of the United States to review the above entitled cause upon appeal.

(b) The Decree Sought to be Reviewed.

The decree appealed from is dated December 10, 1934, entered and filed of record December 14, 1934. The petition for appeal is presented February 6, 1935. The decree is attached hereto as Appendix I.

(c) Nature of the Case and of the Rulings of the Court.

Related causes arising out of this situation were before the Supreme Court in *United States* v. *Atlanta, Birmingham & Coast Railroad Company,* 282 U. S. 522, and before the United States District Court on two previous occasions in *Atlanta, Birmingham & Coast Railroad Company* vs. *United States,* 28 Fed. (2d) 885, and *Atlanta, Birmingham & Coast Railroad Company* vs. *United States,* 37 Fed. (2d) 401. The decree herein appealed from is reported as *Atlanta, Birmingham & Coast Railroad Company* vs. *United States,* not yet reported. (See Appendix I.) The facts are fully stated in the above opinions.

Prior to February 23, 1926, the properties of Atlanta, Birmingham & Atlantic Railway Company, herein sometimes referred to as the Old Company, were in the hands of a receiver appointed by the United States District Court for the Northern District of Georgia in suits instituted against it by its creditors and trustees under mortgages executed or assumed by it. On February 23, 1926, there was executed by representatives of the bondholders and by Atlantic Coast Line Railroad Company the agreement of February 23, 1926.

Under this agreement the bondholders of the Atlanta, Birmingham & Atlantic Railway Company were to bid at foreclosure sale for the properties of the Old Company and its receiver and, if successful, were to organize a New Company under the laws of the State of Georgia. The New Company was to have authority to issue non-voting, five per cent. preferred stock of $100.00 par value and in an amount sufficient to provide $60.00 of preferred stock for each $100.00 of bonds of the Old Company outstanding, and also to issue 150,000 shares of voting no par common stock, and was to issue said stock, common and preferred, in acquiring the said properties from the purchasers at foreclosure. The Old Company, or its receiver, had outstanding obligations shown in Exhibit A to said agreement and then estimated at $3,677,500.00, but now ascertained to be $4,248,413.76, having priority over the bonds of the Old Company. The Atlantic Coast Line Railroad Company agreed to furnish funds with which to pay such amounts already matured and to provide for the payment, at maturity, of such as were not yet due, and also to guarantee the five per cent. dividend on the preferred stock, and the retirement value thereof, which is not less than par value in any circumstances, and in others, $103.00 per share plus accrued dividends. The bondholders were to convey to the New Company the properties acquired at foreclosure subject only to such of the items included in said Exhibit A as might not, at the time of such conveyance, have been paid because not yet matured and the New Company was to pay for said properties by issuing to the bondholders all of its stock, common and preferred. The preferred stock, guaranteed as aforesaid, was to be delivered by the Committee to the bondholders in exchange for their bonds, and the entire 150,000 of voting common

stock was to be sold by the purchasers to Atlantic Coast Line Railroad Company.

The agreement of February 23, 1926, was made the basis of the Plan of Reorganization, which was adopted by the bondholders. This Plan was adopted for the purpose of making the agreement effective.

To accomplish this Plan the bondholders, acting for the Atlanta, Birmingham and Coast Railroad Company yet to be organized, filed an application with the Interstate Commerce Commission—Finance Docket No. 5454—seeking authority to carry out the plan and to issue the Stock. Atlantic Coast Line filed an application—Finance Docket No. 5470—seeking authority to acquire control of the Atlanta, Birmingham and Coast Railroad Company and to execute the guaranty contemplated by the plan. General authority to carry out the plan was given by the Commission in its report and order of October 26, 1926 (117 I. C. C. 181). Thereafter, the Atlanta, Birmingham and Coast Railroad Company was organized and filed its application, adopted the one theretofore filed for its account, and the Commission entered its order of December 21, 1926 (117 I. C. C., 439) authorizing the consummation of the plan.

This order of December 21, 1926 contained the following condition:

> "Provided, however, and authority to issue said stock is granted upon the express condition, that, for the purposes of the accounting, as provided in the classification of investment in road and equipment in the text of account 41, 'Cost of Road purchased,' the cash value of the preferred stock issued must, in stating the transactions in the accounts, be reckoned on a basis not in excess of its par value; and that the cash value of the common stock issued must be reckoned on a basis not in excess of the amount received therefor."

As of January 1, 1927, the property of the old Atlanta, Birmingham and Atlantic Railway Company and its receiver was conveyed to appellant. Prior to this conveyance the Atlantic Coast Line Railroad Company had paid, or provided for, all of the outstanding claims of the Old Company, or its receiver, having priority, so that the Atlanta, Birmingham & Coast Railroad Company received the property free of liens.

In June, 1927, appellant submitted to the Interstate Commerce Commission opening entries to be set up in its accounts according to said condition and the rules and regulations of the Interstate Commerce Commission. Approval of the figures proposed by appellant for these opening entries on its books was denied by the Commission's Bureau of Accounts and appellant was ordered to set up, in its Road and Equipment Account, at approximately $7,000,000, the 640 miles of railroad and other property which it had so acquired and which property had been, without objection by the Commission, carried in the accounts of the old Atlanta, Birmingham and Atlantic Railway Company, up to and including December 31, 1926, at a figure in excess of $38,000,000. Appellant filed before the Interstate Commerce Commission petition for a hearing by the Commission and for a withdrawal of the order of its Bureau of Accounts. This petition was denied by the Commission without a hearing, by its order of April 9, 1928. Thereupon appellant filed in the District Court of the United States for the Northern District of Georgia, a bill seeking an injunction of the order of the Commission and that Court in its opinion and decree of October 26, 1928, construed the condition of the Commission's order as requiring that the property be set up at its fair cash value (28 Fed. (2d) 885) and enjoined all persons interested in the enforcement of said order and their officers and agents from enforcing the

same. No appeal was taken from this decree of said District Court. The Commission then ordered a hearing and made a report dated October 9, 1929, in which it stated that the meaning of the said condition in its order of December 21, 1926, was something entirely different from the meaning of that condition as fixed by the said District Court in its decree of October, 1928 (158 I. C. C., 6). This action by the Commission was attacked by appellant in a bill to set aside and enjoin the same, which was filed in the said District Court, and that court again enjoined, by its decree of January 18, 1930 (reported in 37 Fed. (2d) 401), the action by the Commission set out in its report dated October 9, 1929.

Appeal was taken to the Supreme Court of the United States and the action of the lower court was by that court reversed on the ground that the Commission had issued no formal order. (*United States* v. *Atlanta, Birmingham and Coast Railroad Company*, 282 U. S. 522.)

Thereafter the Commission on its own motion entered upon a further investigation to which it gave a new docket number—Docket No. 25170. After hearing, at which witnesses for appellant testified as to the value of the property acquired by it and at which a witness from the Commission's Bureau of Finance testified as to the value of the securities issued by appellant in exchange for the property, the Commission issued its report and order of July 9, 1934 (201 I. C. C. 645). In the report on which this order is based, the Commission apparently abandons its contention as to the meaning of the condition in its order of December 21, 1926 (which contention had been denied by the District Court), and based its July 9, 1934, report on the finding—contrary to all of the evidence in the record—that appellant received its property subject to the debts amounting to $4,248,413.76, theretofore paid or provided for, in accord-

ance with the plan, by Atlantic Coast Line Railroad Company. This order of July, 1934, reads as follows:

> "A hearing and investigation of the matters and things involved in this proceeding having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof;
>
> "*It is ordered,* That the Atlanta, Birmingham and Coast Railroad Company adjust its current accounts to eliminate from account 751, 'Capital Stock', all liability on account of non-par common stock in excess of $4,248,413.76.
>
> "*It is further ordered,* That the Atlanta, Birmingham and Coast Railroad Company adjust its current accounts to state the balance in account 701, 'Investment in road and equipment', in accordance with the classification of investment in road and equipment as provided under account 41, 'Cost of road purchased', and in conformity with the preceding paragraph hereof.
>
> "*And it is further ordered,* That this order shall take effect and be in force from and after 30 days from the date of service hereof."

Appellant contends that under the facts and under the proper construction of the condition in the order of December 21, 1926, hereinabove quoted, appellant is entitled to set up in its balance sheet Account 701 (Investment in Road and Equipment) a figure fairly representing, as of January 1, 1927, the 640 miles of railroad and other property acquired by it free of liens in exchange for its stock, common and preferred. Appellant has set up on its books its Road and Equipment Account at $24,010,145.37, which figure is based on the valuation made by the Commission in 1914 of the property acquired by appellant in 1927, plus the net of additions and betterments between said dates. The

Commission, by its report and order here attacked, holds that its valuation so made is not evidence of the market or exchange value of the property so acquired by appellant, and by its order here attacked, requires appellant to set up its common stock at $4,248,413.76 and to set up its preferred stock at $5,180,300, or a total of $9,248,713.76. This is, substantially, the exact figure, use of which was enjoined by the District Court of the United States by its decree of October, 1928, above referred to, and results in the requirement by the Commission that appellant set up its Road and Equipment account at $6,729,896.03.

Appellant submits that this figure, so required by the Commission, has no fair relation to the value of the property acquired by it and is contrary to all of the evidence in this record, and that the order of the Commission, fixing this figure, is arbitrary, capricious, and is not supported by substantial evidence in this record; and that, therefore, the said order should be enjoined.

(d) Cases Sustaining Jurisdiction.

Interstate Commerce Commission vs. *Goodrich Transit Co.*, 224 U. S. 194;
I. C. C. v. *L. & N. R. Co.*, 227 U. S. 88, 91;
Kansas City Southern Ry. Co. vs. *United States*, 231 U. S. 423;
B. & O. v. *United States*, 264 U. S. 258, 265-6;
United States vs. *Atlanta, Birmingham & Coast R. Co.*, 282 U. S. 522;

Respectfully submitted,

CARL H. DAVIS,
JOHN A. HYNDS,
ROBERT C. ALSTON,
WM. HART SIBLEY,
Solicitors for Atlanta, Birmingham & Coast R. R. Company.

APPENDIX I.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

In Equity.

No. 767.

ATLANTA, BIRMINGHAM & COAST RAILROAD COMPANY,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

Final Decree.

This case came on for hearing for final decree before a court composed of Honorable Samuel H. Sibley, Circuit Judge, Honorable W. I. Grubb and Honorable E. Marvin Underwood, District Judges, and evidence and argument were heard. The court took time to consider, and now, being fully advised, our conclusions are stated as follows:

In the proceedings heretofore had touching the accounting entries upon the books of complainant here in controversy, the Interstate Commerce Commission has taken the broad view that in the negotiations by which complainant acquired its railroads, the reorganization committee and its members through whom the title passed ought to be ignored, and the matter viewed as though Complainant had dealt directly with Atlantic Coast Line Railroad Company, given to it its whole common stock in exchange for the cash payments made by Atlantic Coast Line Railroad Company, by which the title was freed of incumbrances (other than the

new preferred stock) and which cash was thus in effect paid to complainant for its common stock. This court, on the other hand, has viewed the transaction more narrowly, noting that the title to the railroad was passed to the members of the Reorganization Committee subject to the incumbrances before the complainant was ever organized, that the Atlantic Coast Line Railroad Company arranged with them to pay off the incumbrances and to receive therefor the common stock when issued, and that months afterwards, upon the organization of complainant, it issued its preferred stock to the Reorganization Committee for distribution to the bondholders of the old company, and its entire common stock in the name of the Atlantic Coast Line Railroad Company, at the direction of the Reorganization Committee, in return for which it received from the Committee a deed to the railroad properties. This deed was expressly made subject to such of the incumbrances as had not therefore been discharged. All were in fact discharged at the time of its delivery, except some relatively slight items not then due, as to which the Atlantic Coast Line Railroad Company then delivered to the Receiver, not to complainant, its commitment for future discharge, which was carried out. In the view of the court the complainant paid for the railroad its entire capital stock, and received for its common stock the value of the railroad less the par of the preferred stock, making it necessary to value the property received and to subtract the par of the preferred stock in order to find what was received for the common stock according to the accounting rules of the Commission and according to the words of the condition in the consent of the Commission to the reorganization transaction.

We do not think the views of the court as heretofore expressed are either *res judicata* or the law of the case on the present bill. They have no more weight than their reasonableness entitles them to. We are not dissatisfied with them, but find it unnecessary to reassert them, because, while the Commission in making the order now under attack adhered to its former broad view that the complainant received for its common stock what the Atlantic Coast Line Railroad Company paid out in cash to disencumber the

property and that no valuation of it was necessary; nevertheless it has also valued it, in conformity with the view of the court, at such a value as that subtraction of the par of the preferred stock gives the same figures for the common stock as were reached originally by the Commission. We do not discover any breach of law in arriving at the value. As a finding of fact it is binding in this court. In either view of the transaction of reorganization, the figure set up by the Commission in the attacked order is unassailable.

It is theerfore considered and adjudged and decreed by the court that the prayers of the petition be denied, and the injunction sought be refused, and the bill dismissed at the cost of complainant.

This the 10th day of December, 1934.

SAM'L H. SIBLEY,
United States Circuit Judge,
W. I. GRUBB,
United States District Judge,
E. MARVIN UNDERWOOD,
United States District Judge,

Filed in Clerk's Office 14th day of Dec'r, 1934. J. D. Steward, Clerk.